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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

JAN 21 1998

Federal Communications Commission
Office of Secretary

In the Matter of)
)
General Communication, Inc.)
)
Petition for Preemption)
Pursuant to Section 253 of)
the Communications Act of 1934)

CC DOCKET NO. 98-14

To: The Commission

PETITION FOR PREEMPTION

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Dated: January 21, 1998

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SUMMARY

General Communication, Inc. ("GCI") urges the Commission to preempt the enforcement of Section 52.355 of Title 3 of the Alaska Administrative Code to the extent that Section 52.355 prohibits non-incumbent carriers from constructing and operating facilities to provide intrastate interexchange services in certain locations in the State of Alaska. Section 52.355 conflicts specifically with the terms of Section 253(a) of the Communications Act because it is as an absolute prohibition on the competitive, facilities-based entry of non-incumbent intrastate long distance providers. Only AT&T Alascom may construct long distance facilities in the covered locations. As the Commission has explained, at a minimum, Section 253(a) forbids state regulations that prohibit all but one entity from providing telecommunications services in a given area. Section 52.355 is just such a regulation.

Moreover, Section 52.355 does not fall within the protected class of state regulation described in Section 253(b) of the Communications Act. First, Section 52.355 is not "competitively neutral." On its face, the regulation singles out non-incumbent carriers and bars them from providing facilities-based long distance services in large areas of Alaska. AT&T Alascom is permitted to construct and operate facilities immediately, while potential competitors cannot do so unless and until the Alaska Public Utilities Commission ("APUC") "redesignates" an area as

suitable for long distance competition. Plainly, Section 52.355 does not treat similarly situated carriers in the same manner.

Second, Section 52.355 is not "necessary" to achieve the public interest goals stated in Section 253(b). The regulation is a blanket prohibition on competitive long distance entry, and it does not contemplate protecting the public safety or safeguarding the rights of consumers through specific service quality and safety requirements. The Commission has held that the term "necessary" set forth in Section 253(b) is not to be construed so as to permit states to overcome the prohibition on barriers to entry set forth in Section 253(a). Section 52.355 is just such a barrier to entry, and it is not saved by labelling it "necessary" under Section 253(b).

Although Section 52.355 conflicts with the terms of Section 253(a) and is not preserved by Section 253(b), the APUC has permitted Section 52.355 to remain in effect. GCI first urged the APUC to abandon Section 52.355 in September, 1996. When no action was taken, GCI formally petitioned the APUC to declare the regulation unenforceable in February, 1997. After considering multiple rounds of briefs and oral arguments on the matter, the APUC still declined to act on Section 52.355, electing instead to study the policy implications of long distance competition in the affected locations. Yet, Section 52.355 is precisely the type of overbroad, anticompetitive state regulation that Congress meant to nullify by enacting Section 253. GCI urges the Commission to declare Section 52.355 unenforceable without delay.

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PETITION FOR PREEMPTION

General Communication, Inc. ("GCI"), by its attorneys, submits this Petition for Preemption pursuant to Section 253 of the Communications Act of 1934, 47 U.S.C. § 253. GCI urges the Commission to preempt the enforcement of Section 52.355 of Title 3 of the Alaska Administrative Code¹ to the extent that Section 52.355 prohibits non-incumbent carriers from constructing and operating facilities to provide intrastate interexchange services in certain locations in the State of Alaska.

I. BACKGROUND

GCI is an Alaska corporation that provides facilities-based long distance services within the State of Alaska and between Alaska and other points worldwide. GCI has provided competitive interstate telecommunications services in Alaska since 1982 and competitive intrastate services since 1991.

In 1990, the Alaska Public Utilities Commission ("APUC") promulgated Section 52.355 as a means to prohibit facilities-

¹ 3 AAC § 52.355 (attached as EXHIBIT A).

based long distance competition in rural Alaska.² Specifically, the APUC determined that "facilities-based competition should not be allowed outside of the locations listed in the revised regulation."³ Thus, the APUC established that facilities-based long distance competition would be permitted only in geographic areas specified in Section 52.355, and that the incumbent provider — now AT&T Alascom — should hold a monopoly on facilities-based long distance service in all other locations.⁴

In 1995, GCI received a limited waiver of Section 52.355(a) from the APUC permitting GCI to conduct a 50-site satellite communications demonstration project in the Alaska bush.⁵ The

² Regulations Governing the Market Structure for Intrastate Interexchange Telecommunications Service, Order No. 6, 10 APUC 407 (1990).

³ Id. at 412-13.

⁴ Beginning in 1975, the Commission developed a similar policy with respect to service in the Alaska bush, effectively establishing — without extensive analysis — that multiple earth station facilities were not necessary in each of the Alaska bush communities. See RCA Global Communications, Inc., Memorandum Opinion and Order and Authorization, 56 FCC 2d 660, 689 (1975). When the Commission issued a final order regarding its policy on service to the Alaska bush in 1984, it confirmed the earlier decision to license only one carrier to own and operate earth stations in the bush region. Policies Governing the Ownership and Operation of Domestic Satellite Earth Stations in the Bush Communities in Alaska, Final Order, 96 FCC 2d 522 (1984). In 1990, GCI petitioned the Commission to begin a rulemaking to alter or abolish its policy regarding the construction of competing earth stations in rural Alaska. See RM-7246. The Commission received comments and reply comments in that rulemaking proceeding, but has not issued an order on GCI's petition.

⁵ See Request by General Communication, Inc., for Waiver of 3 AAC 52.355(a) and Approval of a 50-Site Demonstration Project, Bench Order, Docket U-95-38(8) (APUC Nov. 9, 1995) (attached as EXHIBIT B).

purpose of the 50-site project is to demonstrate, among other things, that long distance service can be improved in the bush communities with the introduction of facilities-based competition, and that such competition is technically and economically feasible. For the purpose of the demonstration project, GCI is utilizing a demand-assigned multiple access ("DAMA") based satellite system that is efficient, reliable, and cost-effective. GCI's demonstration continues today.

Since GCI's demonstration project is temporary in nature, and because GCI desires to provide service to areas not covered by the limited grant of demonstration authority, on September 3, 1996 — in a proceeding to implement the requirements of the federal Telecommunications Act of 1996 ("1996 Act") — GCI urged the APUC to declare that enforcement of Section 52.355 was preempted under Section 253(a) of the Communications Act.⁶ The APUC did not act on GCI's request. Accordingly, on February 10, 1997, GCI formally petitioned the APUC to issue a declaratory ruling that Section 52.355 is rendered unenforceable under Section 253(a). The APUC put GCI's petition out for public comment.

After receiving comments or reply comments from GCI and five other parties on the legality of Section 52.355, the staff of the

⁶ See In the Matter of the Inquiry to Determine the Need for Rules to Implement the Telecommunications Act of 1996, Docket R-96-3, Comments of General Communication, Inc. (filed Sept. 3, 1996).

APUC prepared a memorandum to the APUC members concluding that Section 52.355:

violates Section 253(a) of the act as the state regulation prevents carriers from offering facilities based services to customers in most rural areas of Alaska. . . . Staff's review indicates that 3 AAC 52.355 is not competitively neutral (a requirement of 253(b)) as only Alascom may build facilities while all other carriers' services are restricted to resale in select areas of the state. . . . Given the above, the Staff concludes that 3 AAC 52.355 is preempted by the Act and should not be enforced.⁷

The Alaska Attorney General's office also prepared a memorandum in which it concurred in the judgment of the APUC staff regarding the preemption of Section 52.355.⁸ The Attorney General's office added:

The regulation on its face allows one carrier to construct facilities and use them and therefore the regulation cannot be saved by Section 253(b). Furthermore, if section 253(b) were to be interpreted to save this regulation, the exception will have swallowed the rule of section 253(a). We must presume that Congress did not intend to establish a rule in one subsection and virtually repeal it in the next.⁹

The Attorney General's office concluded that the APUC "should issue an order declaring the regulation invalid, state that the Commission does not intend to enforce it, and initiate a regulations docket to repeal 3 AAC 52.355."¹⁰

⁷ Memorandum of Lori Kenyon, Common Carrier Specialist, Alaska PUC, Docket R-97-1, Aug. 22, 1997, at 3 (attached as EXHIBIT C).

⁸ See Memorandum of Ron Zobel, Assistant Attorney General, State of Alaska, Department of Law, Aug. 22, 1997, at 1 (attached as EXHIBIT D).

⁹ Id. at 1-2.

¹⁰ Id. at 2.

In a Public Meeting on August 27, 1997, however, the APUC declined to declare Section 52.355 unenforceable.¹¹ Although the APUC staff and the Attorney General's office testified in the Public Meeting that Section 52.355 could not be sustained under Section 253 of the Communications Act,¹² the Commission left for another day what, if anything, to do about the local regulation. Moreover, after considering five additional briefs on the matter and oral arguments during the Fall of 1997, the APUC once again declined to declare Section 52.355 unenforceable in a Public Meeting on December 17, 1997.¹³ Even though APUC Chairman Cotten and Commissioner Ornquist each concluded that Section 52.355 was squarely inconsistent with the terms of Section 253,¹⁴ the APUC decided to postpone any decision on Section 52.355 pending a report from the staff on the policy implications of competition in the covered locations.

Thus, despite the patent conflict with the requirements of Section 253 of the Communications Act, Section 52.355 remains in effect in Alaska. GCI is not permitted to construct and operate telecommunications facilities in certain locations in Alaska, and

¹¹ See APUC August 27, 1997, Public Meeting, Transcript at 39 ("APUC August 27 Public Meeting Transcript") (attached as EXHIBIT E).

¹² See id. at 9 (statement of Ms. Kenyon); id. at 19 (statement of Mr. Zobel).

¹³ See APUC December 17, 1997, Public Meeting, Transcript at 36-37 ("APUC December 17 Public Meeting Transcript") (attached as EXHIBIT F).

¹⁴ Id. at 24-25 (statement of Commissioner Ornquist); id. at 26 (statement of Chairman Cotten).

the incumbent service provider — AT&T Alascom — is afforded an ongoing monopoly for so long as the APUC does not act. Section 52.355 is precisely the type of State regulation that Congress meant to nullify by enacting Section 253(a). If the APUC will not declare Section 52.355 to be preempted, GCI urges the Commission to do so without delay.

II. THE COMMISSION SHOULD PREEMPT THE ENFORCEMENT OF SECTION 52.355 PURSUANT TO SECTION 253(d) OF THE COMMUNICATIONS ACT

GCI urges the Commission to preempt the enforcement of Section 52.355 pursuant to Section 253(d) of the Communications Act. The test in this regard is clear. According to the Commission:

we first determine whether the challenged law, regulation or legal requirement violates the terms of section 253(a) standing alone. If we find that it violates section 253(a) considered in isolation, we then determine whether the requirement nevertheless is permissible under section 253(b). If a law, regulation, or legal requirement otherwise impermissible under subsection (a) does not satisfy the requirements of subsection (b), we must preempt the enforcement of the requirement in accordance with section 253(d).¹⁵

In this case, Section 52.355 on its face prohibits non-incumbent telecommunications carriers from providing specific intrastate telecommunications services in Alaska. Enforcement of this prohibition plainly conflicts with the terms of Section 253(a). Moreover, Section 52.355 is neither "competitively neutral" nor

¹⁵ Public Utility Commission of Texas et al. Petitions for Declaratory Ruling and/or Preemption of Certain Provisions of the Texas Public Utility Regulatory Act of 1995, Memorandum Opinion and Order, FCC 97-346, ¶ 42 (rel. Oct. 1, 1997). See also Silver Star Telephone Co., Inc., Petition for Preemption and Declaratory Ruling, Memorandum Opinion and Order, FCC 97-336, ¶ 37 (rel. Sept. 24, 1997).

"necessary" to serve the public interest goals enumerated in Section 253(b). The Commission, therefore, "must preempt the enforcement of the requirement in accordance with section 253(d)."

A. Section 52.355 Conflicts Specifically with the Terms of Section 253(a)

First, Section 52.355 conflicts specifically with the terms of Section 253(a) of the Communications Act. Subsection 52.355(a)(1) enumerates locations within the State of Alaska in which "[a]ll interexchange carriers are permitted to construct facilities and use those facilities in the provision of intrastate interexchange telephone service" ¹⁶ Subsection 52.355(a)(2), however, provides:

In a location not listed in (1) of this subsection, only the incumbent carrier is permitted to construct facilities and use those facilities in the provision of intrastate interexchange telephone service. ¹⁷

Thus, subsection 52.355(a)(2) operates as an absolute prohibition on the competitive, facilities-based entry of non-incumbent intrastate interexchange service providers. Only AT&T Alascom is permitted to construct facilities in certain locations in Alaska.

Section 253(a) of the Communications Act is clear:

No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service. ¹⁸

¹⁶ 3 AAC § 52.355(a)(1).

¹⁷ Id., § 52.355(a)(2).

¹⁸ 47 U.S.C. § 253(a).

The Communications Act defines "telecommunications service" as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used."¹⁹ It is not disputed that Section 52.355 covers a "telecommunications service" as it is defined here.

Thus, Section 52.355 unavoidably conflicts with the terms of Section 253(a) of the Communications Act. On its face, subsection 52.355(a)(2) prohibits a broad class of entities from providing intrastate interexchange telecommunications service in areas where AT&T Alascom has exclusive State authorization to provide service. Unless and until the APUC, elects to "reclassify a location in the state based on a determination that traffic density and other relevant factors require reclassification,"²⁰ only the "incumbent carrier is permitted to construct facilities and use those facilities"²¹ to provide service in that location. Plainly, Section 52.355 preserves the very intrastate service monopoly that the 1996 Act was meant to eradicate. The provision even is entitled "Scope of competition."²²

¹⁹ Id., § 153(46).

²⁰ 3 AAC § 52.355(a)(3).

²¹ Id., § 52.355(a)(2).

²² 3 AAC § 52.355.

Such a regulation cannot stand under the Commission's interpretations of Section 253(a). In its very first application of Section 253, the Commission said:

We conclude that section 253(a), at the very least, proscribes State and local legal requirements that prohibit all but one entity from providing telecommunications services in a particular State or locality.²³

On that basis, the Commission has preempted the enforcement of the decisions of two Kansas municipalities to deny the franchise requests of a competitive local exchange carrier ("LEC"),²⁴ a Connecticut decision to ban the provision of payphone service by non-LECs,²⁵ a Wyoming statute that permitted rural incumbent LECs to veto the entry of competitors,²⁶ and a Texas statute that prohibited the award of certificates of operating authority to serve certain rural areas.²⁷ According to the Commission, such "prohibition[s] on competitive entry against a particular class of potential competitors [are] inconsistent with the pro-competitive policies of the 1996 Act and violate[] section

²³ Classic Telephone, Inc., Petition for Preemption, Declaratory Ruling and Injunctive Relief, Memorandum Opinion and Order, 11 FCC Rcd 13082, 13095 (1996), pet. for review pending, City of Boque, Kansas and City of Hill City, Kansas v. FCC, No. 96-1432 (D.C. Cir. filed Nov. 22, 1996).

²⁴ Classic Telephone, 11 FCC Rcd at 13106.

²⁵ New England Public Communications Council Petition for Preemption Pursuant to Section 253, Memorandum Opinion and Order, 11 FCC Rcd 19713, 19727 (1996), recon. denied, 12 FCC Rcd 5215 (1997).

²⁶ Silver Star at ¶ 46.

²⁷ Public Utility Commission of Texas at ¶ 107.

253(a)."²⁸ In Alaska, Section 52.355 constitutes just such a prohibition.

Significantly, that subsection 52.355(b) permits competitive entrants to resell the incumbent's intrastate interexchange service in the restricted areas of Alaska²⁹ does not save the regulation from its conflict with federal law. Section 253(a) forbids any State regulation that prohibits or has the effect of prohibiting the ability of "any entity to provide any interstate or intrastate telecommunications service."³⁰ As the Commission explained in October:

[W]e find that section 253(a) bars state or local requirements that restrict the means or facilities through which a party is permitted to provide service, i.e., new entrants should be able to choose whether to resell incumbent LEC services, obtain incumbent LEC unbundled network elements, utilize their own facilities, or employ any combination of these three options.³¹

Indeed, "Congress intended primarily for competitive markets to determine which entrants shall provide the telecommunications services demanded by consumers."³² Yet, in Alaska, non-incumbent telecommunications companies may not provide facilities-based intrastate long distance services under Section 52.355. Far from saving Section 52.355, subsection (b) simply confirms that the

²⁸ New England Public Communications Council, 11 FCC Rcd at 19721.

²⁹ 3 AAC § 52.355(b).

³⁰ 47 U.S.C. § 253(a) (emphasis added).

³¹ Public Utility Commission of Texas at ¶ 74. See also id. at ¶ 76.

³² Silver Star at ¶ 38.

Alaska regulation cannot be sustained under federal law.³³

Section 52.355 plainly "violates the terms of section 253(a)."

B. Section 52.355 Does Not Fall Within the Protected Class of State Regulation Described in Section 253(b)

In addition to conflicting expressly with the terms of Section 253(a), Section 52.355 also "does not fall within the protected class of state regulation described in section 253(b)."³⁴ Section 253(b) preserves the authority of States to impose requirements to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers, provided that the requirements imposed are (1) "competitively neutral" and (2) "necessary" to accomplish those goals.³⁵ Section 52.355 satisfies neither requirement.

1. Section 52.355 is Not Competitively Neutral

First, the Section 52.355 prohibition on competitive long distance entry in certain locations in Alaska is not "competitively neutral." The Commission has made clear that, "[a]t the very least, this mandate of competitive neutrality

³³ See APUC August 27 Public Meeting Transcript at 19 (statement of Mr. Zobel) ("if the effect is to create an economic situation where no one else can provide that service, then it seems like this is the paradigm of what Congress had in mind when it said state and local governments shouldn't be doing this").

³⁴ New England Public Communications Council, 11 FCC Rcd at 19720.

³⁵ 47 U.S.C. § 253(b). See also New England Public Communications Council, 11 FCC Rcd at 19721.

requires the [State] to treat similarly situated entities in the same manner."³⁶ Yet, Section 52.355 is not even neutral on its face, singling out non-incumbent long distance carriers and barring them from providing facilities-based service in wide areas of the state.³⁷

Indeed, it cannot reasonably be said that Alaska treats all similarly situated entities in the same manner under Section 52.355 when AT&T Alascom is permitted to construct and operate long distance telecommunications facilities to the exclusion of all others. Nor are all parties treated in the same manner when new entrants cannot serve a region unless and until the APUC approves the location for competition, while AT&T Alascom may provide service immediately. The enforcement of Section 52.355 has "the effect of foreclosing entry by one competitor while allowing another to enter,"³⁸ which is precisely what Congress

³⁶ Classic Telephone, 11 FCC Rcd at 13101-02.

³⁷ Cf. Silver Star at ¶ 42 (no competitive neutrality where "provision favors certain incumbent LECs over all potential new entrants"); Public Utility Commission of Texas at ¶ 82 (no competitive neutrality where provisions "single out only [certain companies] and require them to construct their own facilities"); id. at ¶ 107 (no competitive neutrality where provision "restricts [certain companies] from providing service in these rural territories"); New England Public Communications Council, 11 FCC Rcd at 19721-22 (no competitive neutrality where provision "singles out independent (i.e., non-LEC) payphone providers and bars them from the payphone market").

³⁸ Classic Telephone, 11 FCC Rcd at 13102.

meant to abolish with Section 253. Section 52.355 is not competitively neutral.³⁹

2. Section 52.355 is Not Necessary to Achieve the Public Interest Goals Stated in Section 253(b)

The Commission has ruled that "[t]he lack of competitive neutrality is . . . dispositive standing alone,"⁴⁰ so the enforcement of Section 52.355 may be preempted without further analysis. Yet, it is also clear that Section 52.355 is not "necessary" to achieve the public interest goals articulated in

³⁹ This point was clear to APUC Commissioner Ornquist. Addressing the continued enforceability of Section 52.355 during the APUC's December 17, 1997, Public Meeting, Commissioner Ornquist said:

[W]hen I look at 253(b) the very first thing that it says is that we can, in fact, impose requirements, but the first requirement it puts on us to do so is we must do it on a competitively neutral basis. Now, there is no way [Section 52.355] is competitively neutral. . . . The intent of the Telco Act of '96, of course, is to bring competition to a greater degree in the telecommunications industry. And I think the regulation we have on the books is totally, completely 180 degrees the other direction. It may have been a good regulation when we put it in there, but according to the Telecommunications Act and the FCC the requirements that are placed on us as a State regulatory authority, I don't think that that regulation is enforceable anymore. I believe we have been superseded on this, and specifically and blatantly on the part where it says that it must be competitively neutral. Sorry. Its not competitively neutral at all.

APUC December 17 Public Meeting Transcript at 24-25 (emphasis added). Indeed, in the August 27 Public Meeting, an Assistant Attorney General for Alaska testified, "In analyzing this, I had a great difficulty in imagining how that could be any more clearly not competitively neutral." APUC August 27 Public Meeting Transcript at 19 (statement of Mr. Zobel). See also id. at 9 (statement of Ms. Kenyon) ("Staff believes [Section 52.355 is] not competitively neutral").

⁴⁰ Silver Star at ¶ 45.

Section 253(b). According to the Commission, "Congress envisioned that in the ordinary case, States and localities would enforce the public interest goals delineated in section 253(b) through means other than absolute prohibitions on entry, such as clearly defined service quality requirements or legitimate enforcement actions."⁴¹

In this case, the blunt instrument of Section 52.355 certainly is not "necessary" to "preserve and advance universal service." In fact, the regulation protects the largest long distance carrier in the nation from competition, denying the benefits of alternative facilities-based long distance services to a large class of users in rural Alaska. Similarly, a blanket prohibition is not "necessary" to "protect the public safety" or to "safeguard the rights of consumers" if Alaska establishes and enforces safety and service quality requirements applicable to all carriers.⁴² As explained by the Commission, what is not "necessary" is a state-sanctioned monopoly:

We do not believe that Congress intended that the term "necessary" be interpreted here in a manner that could enable the exception contained in subsection 253(b) to

⁴¹ Classic Telephone, 11 FCC Rcd at 13102 (footnote omitted).

⁴² See, e.g., id. (describing the uniform application of empirical standards to safeguard the public interest). See also APUC August 27 Public Meeting Transcript at 22 (statement of Ms. Kenyon) ("You may be able to modify [Section 52.355] by saying safe and efficient facilities by fit, willing and able carriers are all able to work out and build out in the Bush").

swallow the general rule prohibiting barriers to entry in subsection 253(a).⁴³

In this case, there are many ways to safeguard the public interest in Alaska other than the current prohibition on entry by an entire class of potential long distance competitors. Thus, Section 52.355 is not "necessary" to achieve the public interest goals stated in Section 253(b), and it is not safeguarded from preemption under federal law.

C. The APUC has Permitted Section 52.355 to Remain in Effect Despite Section 253(a)

Notwithstanding the specific conflict between Section 52.355 and the terms of Section 253(a) of the Communications Act, the APUC has permitted Section 52.355 to remain in effect. It has been nearly eighteen months since GCI first urged the APUC to declare Section 52.355 unenforceable, and nearly one year since GCI formally petitioned the APUC for a declaratory ruling that the regulation is preempted. Yet, at the APUC's August 27, 1997, Public Meeting — after considering the unambiguous testimony from the Alaska Attorney General's office and from the APUC staff that Section 52.355 is preempted by federal law — the APUC Chairman and several of the Commissioners indicated that they would leave the issue of Section 52.355 for another day.⁴⁴

⁴³ New England Public Communications Council, 11 FCC Rcd at 19725.

⁴⁴ See, e.g., APUC August 27 Public Meeting Transcript at 29 (statement of Commissioner Cook); id. at 34-36 (statements of Commissioner Ornquist); id. at 39 (statement of Chairman Cotten).

Likewise, when revisiting the issue on December 17, 1997, the APUC decided to consider the policy implications of permitting long distance competition in rural Alaska before taking up Section 52.355 again.⁴⁵ For example, according to Commissioner Hanley:

On this particular question as far as the policy at this point I'm not willing to say let's just repeal the reg. To me it's premature. I need some more information. It's a timing question. . . . At this point I'm not willing to say yeah, let's great, let's just repeal the regulation and do what we have to do to proceed in that direction. I have more questions about Universal Service, access charges, what we've achieved or what GCI has achieved through the 50 site demonstration project, and what has been the benefit to consumers.⁴⁶

Commissioner Posey added:

We have a number of concerns that we in Alaska have to look at separately. We have to understand the impact on not only the urban or more urban community, but also those in the rural areas. Provider of last resort . . . Universal Service. . . . So I'm more in the line of looking at this as tabling so that we can answer some of those questions and know exactly what the impact is going to be on the consumers as we move forward because in the end that's it.⁴⁷

Though Commissioner Ornquist argued that — irrespective of these policy considerations — Section 52.355 could not be sustained under the 1996 Act,⁴⁸ the APUC decided once again to table any consideration of repealing the regulation.

⁴⁵ See APUC August 27 Public Meeting Transcript at 36-37.

⁴⁶ APUC December 17 Public Meeting Transcript at 22-23.

⁴⁷ Id. at 23-24.

⁴⁸ See note 39 supra.

Each day that the APUC does not act to eliminate this prohibition on facilities-based competition in Alaska, however, the APUC "has permitted . . . [a] regulation, or legal requirement that violates"⁴⁹ Section 253(a). As the Commission wrote in September:

[U]ntil the passage of the 1996 Act, states could and did award monopoly status to certain firms to provide service in prescribed areas within the state. Pursuant to section 253, such state actions are no longer permissible.⁵⁰

Section 52.355 is precisely the type of anticompetitive State regulation that Congress meant to eradicate in making Section 253(a) of the Communications Act the law of the land. If the APUC will not declare Section 52.355 to be preempted, GCI urges the Commission to do so without delay.

⁴⁹ 47 U.S.C. § 253(d).

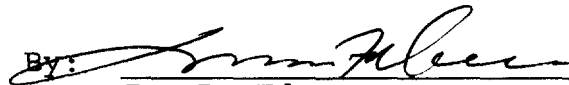
⁵⁰ Public Utility Commission of Texas at ¶ 4 (emphasis added).

III. CONCLUSION

For these reasons, GCI urges the Commission to preempt the enforcement of Section 52.355 to the extent that it prohibits non-incumbent carriers from constructing and operating facilities to provide intrastate interexchange services in certain locations in the State of Alaska.

Respectfully submitted,

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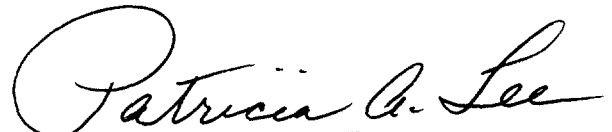

Patricia A. Lee

EXHIBIT A

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1998

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of the State of Alaska

ANNOTATED

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